No. 77-1769

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

EASTERN SCIENTIFIC COMPANY,

Petitioner,

v.

WILD HEERBRUGG INSTRUMENTS, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

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Opinion Below

The opinion of the Court of Appeals (Pet. App. A) is reported at 572 F. 2d 883.

Jurisdiction

The judgment of the Court of Appeals was entered on March 17, 1978 and the mandate came down on April 7, 1978. The Petition for a Writ of Certiorari was filed on June 14, 1978. The jurisdiction of this Court is invoked under 28 USC §1254(1).

Statute Involved

The statutory provision is Section 1 of the Sherman Antitrust Act, 15 USC §1 (Pet. App. B).

Question Presented

Whether the court below properly reversed the judgment of the District Court and remanded the case for a new trial consistent with the standards explained in *Continental TV, Inc.* v. *G.T.E. Sylvania, Inc.*, —— US ——, 97 S. Ct. 2549 (1977) where it found that the respondent had a policy of territorial restrictions on the sale of its products by petitioner, a dealer.

Statement

The Petitioner, Eastern Scientific Company (hereinafter Eastern) is a Rhode Island corporation in the business of selling scientific instruments and medical supplies. Eastern sold Wild Heerbrugg microscopes as a dealer for Wild Heerbrugg Instruments, Inc. (hereinafter Wild), from 1961 through February, 1973, when Wild terminated Eastern's dealership. The Wild Heerbrugg microscope is manufactured by Wild Heerbrugg, Ltd., a Swiss company, and is a highly sophisticated instrument normally sold to hospitals, universities or other research facilities.

In July of 1973, Eastern filed a complaint in the United States District Court for the District of Rhode Island alleging, inter alia, that Wild had violated Section 1 of the *Sherman Act* by wrongfully establishing resale prices for its products distributed by the plaintiff. An amended complaint filed on November 30, 1976, further alleged that the

Respondent had a policy of territorial restriction on the sale of its microscopes by its dealers.

The Respondent counterclaimed for the value of merchandise retained by Eastern after its termination. Jurisdiction in the District Court was conferred by 28 USC, §1337 (Commerce and Anti-Trust Regulations) and 28 USC, §1332 (Diversity of Citizenship).

The trial commenced on November 17, 1976, and concluded on January 12, 1977. The Petitioner's primary liability witnesses were David Brodsky and Elliot Brodsky, the principals of the plaintiff corporation. In essence, plaintiff's contentions[1] were that its sales of Wild products were restricted to the State of Rhode Island, and that it was not permitted to sell below list price outside the State of Rhode Island as a means of enforcing the territorial restriction. As the record below shows, Wild vigorously denied these claims. In this regard, it should be noted that contrary to Eastern's Statement (Petition, Page 3), there was no evidence whatsoever in the record to the effect that ". . . when Eastern bid at list price, the sale always went to the local dealer if that dealer also solicited the sale." Since the trial was conducted prior to this Court's decision in *Continental TV, supra,* Eastern only offered proof of its relationship with Wild. No proof of a market effect, whether reasonable or unreasonable, was offered, nor was any evidence offered which supports the above quotation from Eastern's Petition.

In fact, Petitioner's testimony and its cause of action was based upon a plaintiff-defendant conspiracy. No evi-

[1] The word is used purposely, as their testimony was at best ambiguous, and was another basis for the appeal to the First Circuit. The Court, having decided the appeal under *Continental TV, supra,* found it unnecessary to reach the other issues raised. See Opinion below §72 F. 2d at 883 at 884.

dence whatsoever was produced to show a conspiracy between Wild and any third party, and Eastern's case was based squarely on footnote "6" in *Albercht* v. *Herald,* 390 U.S. 145, 150, n. 6, 88 S. Ct. 869 (1968). In light of this approach, Eastern apparently believed it to be unnecessary to offer proof in support of the conclusions it now presents to the Court.

In summary, the thrust of Eastern's testimony was that of a territorial restriction. Eastern's witness (David Brodsky) testified that he was not permitted to sell Wild products outside of Rhode Island. This is clearly a territorial restriction! Mr. Brodsky further testified that to enforce this restriction, Wild, through its employee Walter Gompertz, told him to sell outside Rhode Island only at list price.

It should be obvious that any restrictions under which brand name dealers are limited to resale in their respective geographic areas, will effectively prevent all competition (including price) between those dealers in the same product. For a plaintiff, in a territorial restriction case, to add the element of "whenever you violate the territorial restriction then you must sell only at list price" is gilding the lily.

Moreover, this Court in *Continental TV, supra,* discussed the precise issue raised by the Brodsky testimony and determined that the primary thrust of the antitrust laws is directed at *interbrand competition* and not *intrabrand competition.* This Court went further and held that vertical restrictions actually promote interbrand competition (97 S.C. 2549 at 2560). Distilled to its purest form, plaintiff's case is that it violated that territorial restriction imposed on it by Wild, and that, as a consequence, Wild is guilty of price fixing. This is absurd!

Wild disputed each and every postulate upon which Eastern rested its case. But even assuming, arguendo, that a territorial restriction existed, the evidence simply does not support Eastern's attempt to bootstrap itself into a price fixing claim.

Eastern's principals contended that they were free to sell Wild products within Rhode Island as they chose. Their testimony was that they were not permitted to sell at all outside of Rhode Island, but if they dared to do so, they had to sell at list price so as to favor the local dealer. This is the essence of a territorial restriction.

At the trial Eastern did not offer any proof that the alleged territorial restriction caused an unreasonable restraint of trade. Moreover, Eastern, contrary to the assertion contained in their Petition (page 7, last paragraph), offered no proof as to Wild's relations with other dealers or as to the nature of Wild's distribution system. Instead, Eastern relied on a theory of a per se violation. The trial court followed the same rationale, and in its charge to the jury it did not distinguish the territorial aspects of the case from plaintiff's claim of price fixing.[2] This is clear from the first interrogatory to the jury: "Did Eastern agree not to sell Wild microscopes at discount outside the State of Rhode Island as a result of threats of termination by Wild of Eastern's dealership?" The relevant part of this question is *territory.* Even assuming Eastern's claim that requiring extra-territorial sales to be made at list price constitutes price fixing, it is impossible to determine from the verdict whether the jury found a territorial re-

[2] The claim of price fixing was based solely on the Brodsky testimony that if Eastern sold outside Rhode Island it was required to do so at list price. However, the Brodskys also testified that on many occasions Eastern made discount sales outside of Rhode Island.

striction, or price fixing. For this reason, the Respondent contended before the First Circuit that an application of *Continental TV, supra,* required reversal.

Eastern contended before the Court below that the practice complained of constituted price fixing and not a territorial restriction. The Court, however, disagreed and found a territorial restriction.

ARGUMENT

The Writ Should Be Denied Since the Decision of the Court Below Is Correct and Is Not in Conflict With Any Decision of This Court.

Petitioner asserts that decision below is in direct conflict with prior decisions of this Court. In support of this assertion, Petitioner relies upon a line of cases holding price fixing to be per se illegal. Petitioner, however, ignores the evidence and erroneously characterizes the case at bar to be one of price fixing. Since this is not the case the Petition should be denied.

Petitioner, as a fallback position, asserts that vertical restrictions as to territory or customers are per se violations of Section 1 of the *Sherman Act* if they are ancillary to price fixing or if the price fixing is an integral part of the entire distribution system. In support of this position, Eastern blandly states that "Wild's price fixing practices were an integral part of its entire distribution system." (Petition, page 7). This is a *new* claim which is not supported by the record, and, in fact, absolutely no proof was ever offered below in support of such a claim. The decision of the Court below in this matter is not based upon any such finding, but instead, the Court found the matter to

be one of territorial restriction and it properly applied *Continental TV* in remanding the case for a new trial.[3]

The analysis by the Court below of the economic effects of Petitioner's claims was correct and aptly points out that, in effect, the claim is no more—and no less than—a territorial restriction. Petitioner seems to argue that the mere mention of price should be sufficient to sidestep the import of *Continental TV, supra,* and to obtain the benefit of a per se charge. This is not so. Almost every case brought under Section 1 of the *Sherman Act* contains a claim that the conduct in question lessens competition, or has a price maintenance effect. To accept the Petitioner's contention would vitiate the necessity for the distinction between territory and price.

In *Oreck Corporation* v. *Whirlpool Corporation and Sears, Roebuck & Co.,* 563 F.2d 54 (2nd Cir., 1977), cited by Petitioner the Second Circuit considered and rejected just such an approach. There Oreck claimed that the termination of its dealership was motivated by a desire to eliminate price competition, or that this was a natural effect of termination.

The Court in *Oreck* did not, at the mere mention of price or competition, decide that the case should be treated as a per se violation. Instead, the Court considered the merits and decided that the termination of a distributor, thereby creating exclusivity in another, required a showing of an unreasonable restraint of trade. The result in *Oreck* was correct, and the analysis set forth in the Petition herein is specious. To reach a different conclusion, one would have to regress to the era where "form controlled sub-

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[3] In addition, the quotation extracted from the Respondent's brief below (Petition, page 8) is incomplete, out of context, and not therefore worthy of consideration.

stance". This was exactly the problem with *U.S.* v. *Arnold, Schwinn and Co.*, 388 U.S. 365 (1966), which this Court overruled in *Continental TV*. The proper rule, and that followed by the Court below, was to consider the market effect. This was the situation in *Oreck*, and should be in *Eastern* v. *Wild* as well.

In *Pitchford Scientific Instruments Corp.* v. *Pepi, Inc., et al.*, 1977-2 Trade Cases Paragraph 61, 741, cited by Petitioner, the decision of Judge Dumbauld was correct in light of *Continental TV*, and is easily reconcilable with the case at bar. In *Pitchford*, the Court of Appeals found that the evidence *established* a *horizontal restraint* (see App. p. 22) which traditionally has been a per se violation of the Sherman Act. Moreover, this Court was careful in *Continental TV* to retain this rule of law, (see *Continental TV, supra*, note 28), and in *Pitchford* the District Judge had determined the defendant's restraints to be *ancillary to an illegal* price fixing scheme. In the case at bar, there was no such showing, and the Court of Appeals made no such finding.

Similarly, *General Beverage Sales Co.* v. *East Side Winery*, —— F. 2d ——, cited by the Petitioner is not in conflict with the case at bar. There the Court noted that the Trial Judge had instructed the jury that termination for *violation of a territorial restriction*, or for *refusing to fix prices*, would be a per se violation of the Sherman Act. The Seventh Circuit in its opinion (see Pet. App. 33) decided that it was impossible to determine from the charge if the jury found a *territorial restriction* alone and, therefore, remanded the case for a new trial. This is exactly the case at bar, since one cannot determine from the charge to the jury precisely what the jury found. However, in this case the First Circuit went further, and

decided that the substance of the Petitioner's allegation was purely territorial.

Wild argued below that based upon the instructions to the jury, it was impossible to determine whether they found a territorial restriction or a price restriction and, accordingly, that reversal for a new trial under the rule of reason as to the territorial restriction was required. Wild also argued that the evidence of the Petitioner at best showed only a territorial restriction; that the Trial Judge incorrectly denied the defendant's motion for a directed verdict; that certain evidentiary rulings were incorrect and that the charge to the jury was inflammatory. It is submitted that all of these issues were substantial and should have required reversal. However, these issues were not decided as the Court below stated:

> Wild's first argument on appeal is that since the time of the district court's decision the law in this area has changed to the extent that a new trial is required. *Because we agree with this position, we see no need to address ourselves to any of the other issues raised in this appeal.* 572 F. 2d 883 p. 884 (emphasis added).

In conclusion, we submit that the jury verdict in light of *Continental TV* is at best inconclusive and is not one finding resale price maintenance. Moreover, the Court of Appeals for the First Circuit properly analyzed the matter at bar, and its decision amounts to a finding that there was no price restraint at all, but merely a territorial restriction. In addition, the decision below is compatible with both *Continental TV*, and the cases decided by the other Circuits (*Oreck, General Beverage*) cited by the Petitioner. The matter is not important enough to warrant this Court's attention and is not a final decision. It is premature for the Petitioner to seek Certiorari at this

time when other issues which could well be dispositive of the matter have not been considered by the Circuit, and before a new trial has been conducted.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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